Supreme Court, U.S.
FILED

07-458 OCT 1 - 2007

OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

TOMI WHITE BRYAN, Individually
and on behalf of all others similarly situated,

Petitioner,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

AMIEL J. ROSSABI
Counsel of Record
FORMAN ROSSABI BLACK, P.A.
3623 North Elm Street
Suite 200
Greensboro, NC 27455
(336) 378-1899

MICHAEL G. WIMER
WIMER & JOBE
349 Haywood Road
Asheville, NC 28806
(828) 350-9799

Counsel for Petitioner

211335

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether, in light of the Supreme Court's decision in *Grable & Sons,* the Federal Court Lacked Subject-Matter Jurisdiction to Grant Injunctive Relief.

2. Whether the Decision of the Fourth Circuit Conflicts with the Decision of this Court in *Parsons Steel* and Violates Principles of Comity Essential to the Federal System.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	3
FACTUAL BACKGROUND	6
REASONS FOR GRANTING THE PETITION	9
I. FEDERAL SUBJECT-MATTER JURISDICTION IS LACKING AND THEREFORE THE INJUNCTION ISSUED BY THE DISTRICT COURT IS NULL AND VOID.	10
II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *PARSONS STEEL* AND VIOLATES	

Contents

Page

THE PRINCIPLES OF COMITY ESSENTIAL TO THE FEDERAL SYSTEM. 15

CONCLUSION 20

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Decided July 3, 2007 ..... 1a

Appendix B — Memorandum Opinion Of The United States District Court For The Middle District Of North Carolina Filed May 31, 2006 ..... 23a

TABLE OF CITED AUTHORITIES

Page

CASES

Bryan v. BellSouth Telecomm., 377 F.3d 424 (4th Cir. 2004) 5, 10, 11, 13

Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) 11

Empire HealthChoice Assur., Inc. v. McVeigh, __U.S. __, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006) 14, 15

Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311 (2nd Cir. 2000) 14

Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308; 125 S. Ct. 2363; 162 L. Ed. 2d 257 (2005) ... *passim*

In re Long Distance Telecomms. Litig., 831 F.2d 627 (6th Cir. 1987) 14

Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986) 11

Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 106 S. Ct. 768, 88 L. Ed. 2d 877 (1986) ..... *passim*

Cited Authorities

Page

Russell v. Sprint Corp., 2003 U.S. Dist. LEXIS 8852 (D. Kan. May 22, 2003) 14

Shulthis v. McDougal, 225 U.S. 561, 56 L. Ed. 1205, 32 S. Ct. 704 (1912) 10, 11

Smith v. GTE Corp., 236 F.3d 1292 (11th Cir. 2001) 14

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C.A. § 1651(a) 2

28 U.S.C.A. § 1738 ..... 3, 9

28 U.S.C. § 2283 ..... 2, 9

47 U.S.C. § 201(b) 7

47 U.S.C. § 254 6

47 U.S.C. § 414 13

47 C.F.R. § 54.706 6

47 C.F.R. § 54.709 (a) 6

N.C.G.S. § 75-1.1 1

N.C.G.S. § 75-16 2

Cited Authorities

Page

RULES

Rule 12(b)(6) 5, 11

OTHER AUTHORITIES

In re Federal-State Joint Board on Universal Service, FCC 01-0145, Notice of Proposed Rulemaking, May 8, 2001 7

In The Matter of Truth-In-Billing And Billing Format, FCC 99-72, First Report and Order and Further Notice of Proposed Rulemaking, May 11, 1999, 14 F.C.C.R. 7492 ..... 8, 12

In re Policy and Rules Concerning the Interstate, Interexchange Marketplace, FCC 99-47, 14 FCC Rec. 6004, March 31, 1999 13

Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329, 17 F.C.C.R. 24952, December 13, 2002 .. 6, 7, 12, 13

Universal Service Order, 12 F.C.C.R. Rcd 8776 (1997) 8, 12

Universal Service Fund Increases: What Every Consumer Should Know, FCC Consumer Fact Sheet, *fcc.gov website*, October 30, 2004 8

Petitioner Tomi White Bryan ("Bryan") respectfully requests that this Court grant her petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 492 F.3d 231 (4th Cir. 2007) and appears in the Petitioner's Appendix ("Pet. App."). Pet. App. 1a - 22a. The opinion of the United States District Court for the Middle District of North Carolina, Greensboro Division, is unpublished, but is accessible at 2006 U.S. Dist. LEXIS 35650 and appears at Pet. App. 23a – 46a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion and Judgment on July 3, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Petitioner's state court claim was brought pursuant to the North Carolina Unfair and Deceptive Practices Act, North Carolina General Statutes § 75-1.1 ("NCUDPA"). Section 75-1.1(a) provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

North Carolina consumers injured by an unfair or deceptive act have standing to sue pursuant to North Carolina General Statutes § 75-16, which provides:

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

The District Court stated that the injunction entered by it barring Petitioner from pursuing her state court claim was issued pursuant to the All Writs Act, 28 U.S.C.A. § 1651(a), which provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

In issuing the injunction, the District Court held that the facts of this case brought it within the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283. The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court

> except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Fourth Circuit, in affirming the District Court, refused to give full faith and credit to the state court order denying BellSouth's motion to dismiss under the Full Faith and Credit Act, 28 U.S.C.A. § 1738, which provides that the judicial proceedings of any court of any State of the United States:

> shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

This case arises from BellSouth's misrepresentations and failure to disclose material facts relating to BellSouth's Federal Universal Service Charge ("FUSC"). The term "Federal Universal Service Charge" is BellSouth's label for recovering Universal Service Fund contributions from its customers, but it is not a label required by the Federal Communications Commission or one used by all carriers. BellSouth imposes the FUSC on each monthly telephone bill. Bryan, on behalf of herself and others similarly situated, filed her Complaint in North Carolina state court against BellSouth on February 22, 2002. BellSouth removed the case to federal court on March 26, 2002.

Bryan filed her First Amended Complaint in federal court on June 4, 2002, alleging causes of action for BellSouth's violation of the NCUDPA, unjust enrichment/restitution, and breach of contract. Bryan also filed a motion to remand her claims to state court. BellSouth filed a motion to dismiss all claims in the First Amended Complaint, arguing that Bryan's claims were preempted by the "filed-rate doctrine."

On February 6, 2003, the District Court granted BellSouth's motion to dismiss some of Bryan's claims. The District Court found that the claims challenging the FUSC as excessive arose under federal law and were preempted by the filed tariff doctrine. The District Court denied BellSouth's motion to dismiss Bryan's deception claim, finding that claim did not challenge BellSouth's tariff, did not arise under federal law, and was not preempted by the FCA or filed-rate doctrine.

The District Court declined to exercise supplemental jurisdiction over the state law claim for deception and remanded that claim. BellSouth appealed the District Court's decision remanding the state law claim.

BellSouth filed with the District Court and the Fourth Circuit Court of Appeals motions to stay the remand order pending appeal. Both motions were denied, and the case proceeded in state court. The parties conducted substantial discovery on the remanded deception claim. Bryan filed a Second Amended Complaint.

The North Carolina Superior Court, Guilford County, denied BellSouth's motion to refer the case to

the FCC pursuant to the primary jurisdiction doctrine. Further, on October 30, 2003, the state trial court certified a class of North Carolina consumers to pursue the claim under the NCUDPA.

On July 28, 2004, the Court of Appeals reversed the District Court's remand order. The Court of Appeals decided that Bryan's deception claim under Count A of the federal complaint arose under federal law because the damage claim, in its view, sought a refund of the USF surcharges, which implicated BellSouth's tariff. The Court of Appeals ordered the claim in Count A dismissed. The panel split its decision 2-1, with the Honorable J. Michael Luttig dissenting. *Bryan v. BellSouth*, 377 F.3d 424 (4th Cir. 2004) (*Bryan I*).

On February 8, 2005, in accordance with the mandate of the Court of Appeals, the District Court dismissed Count A of the federal court First Amended Complaint.

On March 18, 2005, BellSouth moved in state court to dismiss Bryan's complaint pursuant to Rule 12(b)(6), arguing that the federal dismissal of Count A of the amended federal complaint was *res judicata* on the issue of Bryan's right to pursue her unfair trade practices claim under the amended state complaint.

By order entered on May 6, 2005, the state court denied BellSouth's motion to dismiss. BellSouth appealed this decision to the North Carolina Court of Appeals.

On September 20, 2005, BellSouth filed a motion in the United States District Court seeking an injunction prohibiting Bryan from pursuing her state court action.

On May 31, 2006, the District Court granted the injunction on the ground that the state court proceedings were rendered a nullity by the Fourth Circuit's vacatur of the District Court's prior remand order. Bryan appealed this ruling to the Fourth Circuit on June 28, 2006.

On July 3, 2007, the Court of Appeals affirmed the District Court on the basis of the relitigation exception to the Anti-Injunction Act, agreeing with BellSouth's *res judicata* argument, but did not find that the Court of Appeals' vacatur of the remand order rendered the ensuing state court proceedings a nullity.

FACTUAL BACKGROUND

The Universal Service Fund ("USF") was created by Congress to provide funding for telecommunications services to rural areas, schools, libraries, and health care providers. 47 U.S.C. § 254. All carriers providing interstate telecommunications to the public, including BellSouth, are required to contribute to the USF. 47 C.F.R. § 54.706. The Federal Communications Commission ("FCC") administers the USF and funds it through an assessment on carriers. Each quarter, the FCC establishes a uniform Contribution Factor, expressed as a percentage, that carriers must contribute to the USF. 47 C.F.R. § 54.709 (a). For a local exchange carrier such as BellSouth, interstate revenues consist of monthly subscriber line charges to its end-user customers. *Report and Order and Second Further Notice*

of Proposed Rulemaking, FCC 02-329, 17 F.C.C.R. 24952, December 13, 2002, ¶ 51, n. 131 ("*FCC Order of December 13, 2002*").

The FCA requires that all carrier charges and practices must be just and reasonable. 47 U.S.C. § 201(b). The FCC has jurisdiction to enact rules to ensure compliance by the carriers. *FCC Order of December 13, 2002*, ¶ 8. Until recently, many carriers, including BellSouth, charged their customers USF recovery fees exceeding the Contribution Factor imposed on the carriers by the FCC. *FCC Order of December 13, 2002*, ¶ 47, n. 125. Further, the USF recovery practices among the carriers varied widely, causing consumer confusion about the amount and nature of the charge. *Id.* at ¶¶ 43-63. The FCC has stated: "This discrepancy between the contribution and the amount carriers charge customers is inexplicable to the casual observer." *In re Federal-State Joint Board on Universal Service*, FCC 01-0145, Notice of Proposed Rulemaking, May 8, 2001, ¶ 5. In effect, the carriers turned an FCC fee into a profit center by marking up the fee and imposing it on their customers.

In December 2002, after Bryan filed her First Amended Complaint and the briefing on the remand issues had been submitted to the District Court, the FCC banned USF mark-ups as a line item. *FCC Order of December 13, 2002*, ¶ 49. The ban took effect on April 1, 2003. *Id.* at ¶ 51. Though the FCC's ban was prospective, the FCC necessarily determined that USF surcharges in excess of the Contribution Factor are unreasonable and violate § 201(b) of the FCA. *FCC Order of December 13, 2002*, ¶ 43.

The FCC does not require carriers to recover their USF contributions from customers. "Each company makes a business decision about whether and how to assess customers to recover Universal Service costs." *Universal Service Fund Increases: What Every Consumer Should Know, FCC Consumer Fact Sheet, fcc.gov website,* October 30, 2004; *see also In The Matter of Truth-In-Billing And Billing Format*, FCC 99-72, First Report and Order and Further Notice of Proposed Rulemaking, May 11, 1999, 14 F.C.C.R. 7492, ¶ 57 ("*Truth-In-Billing Order*"). Before banning USF mark-ups, the FCC determined that

> we would not consider a description of that [USF] charge as being "mandated" by the Commission or the federal government to be accurate . . . Accordingly, to state or imply that a carrier has no choice regarding whether or not such a charge must be included on the bill or the amount of the charge would be misleading.

Truth-In-Billing Order, at ¶ 57. Moreover, carriers "must be careful to convey information in a manner that does not mislead by omitting important information that indicates that the contributor has chosen to pass through the contribution or part of the contribution to its customers and that accurately describes the nature of the charge." *Universal Service Order*, 12 F.C.C.R. 8776, 9211-12 ¶ 855 (1997).

All of Bryan's claims challenging BellSouth's FUSC as excessive have been dismissed. In the remaining state court deception claim, Bryan alleges BellSouth has

misrepresented facts and failed to disclose material information regarding its FUSC. BellSouth's deception prevented consumers from adequately comparing the cost of various telephone services and packages because BellSouth led consumers to believe its FUSC was government-mandated and that all carriers therefore imposed the same fee on their customers. Bryan seeks to recover damages on behalf of herself and similarly situated North Carolina customers as a result of these deceptive acts. Bryan is not seeking to rewrite BellSouth's tariffs or to enforce a promised rate that differs from the tariff.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for a writ of certiorari for two reasons.

First, under recent decisions of this Court, including *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308; 125 S. Ct. 2363; 162 L. Ed. 2d 257 (2005), it is apparent that federal subject-matter jurisdiction is lacking in this case, rendering null and void the injunction order that was affirmed by the Court of Appeals.

Second, the decision of the Court of Appeals conflicts with the decision of this Court in *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 106 S. Ct. 768, 88 L. Ed. 2d 877 (1986), and violates the principles of comity recognized in *Parsons Steel* and protected by the Anti-Injunction Statute, 28 U.S.C. § 2283, and the Full Faith and Credit Act, 28 U.S.C.A. § 1738.

I. FEDERAL SUBJECT-MATTER JURISDICTION IS LACKING AND THEREFORE THE INJUNCTION ISSUED BY THE DISTRICT COURT IS NULL AND VOID.

In *Bryan I*, the Fourth Circuit Court of Appeals determined that Bryan's amended complaint arose under federal law because it presented a substantial question of federal law. 377 F.2d at 432. The Court of Appeals' decision was issued on July 28, 2004. Subsequent to that opinion, the Supreme Court issued the seminal decision in *Grable & Sons*, which narrowly defined the scope of federal question jurisdiction when, as here, the plaintiff has not pleaded a federal cause of action. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308; 125 S. Ct. 2363; 162 L. Ed. 2d 257 (2005). Under *Grable & Sons* and its progeny, there is no federal subject-matter jurisdiction in this case.

In *Grable & Sons*, the Court framed the critical inquiry as follows: "[D]oes a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." 545 U.S. at 314. "As early as 1912, this Court had confined federal-question jurisdiction over state-law claims to those that 'really and substantially involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law'." 545 U.S. at 313 (*quoting Shulthis v.*

McDougal, 225 U.S. 561, 569, 56 L. Ed. 1205, 32 S. Ct. 704 (1912).

At issue in this case is whether Bryan's deception claim under the NCUDAP "necessarily" raises a stated federal issue, actually disputed and substantial. Bryan submits that her claim does not. BellSouth argues that Bryan's deception claim conflicts with the tariff it filed with the FCC because any damages awarded to Bryan or the putative class would essentially constitute a refund of the tariff. Bellsouth also contends that Bryan is essentially asking a state court to determine whether its filed tariff is reasonable. For the reasons that follow, however, these contentions are without merit.

First, nowhere in the Complaint does Bryan seek a "refund" of all or a portion of the filed rate. As the Court of Appeals wrote, "[i]n actuality, Bryan does not specify the nature of her damages in Count A." 377 F.2d at 430. Subject-matter jurisdiction cannot be premised on a theory the plaintiff has not advanced. *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 809 n. 6, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986). It is important that the First Amended Complaint was dismissed by the District Court under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Moreover, federal question jurisdiction cannot rest upon a preemption defense. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). Therefore, Bryan's complaint does not "necessarily" raise a stated federal issue, so the first prong of the *Grable & Sons'* test is not met.

BellSouth will necessarily argue that the complaint raises a federal issue, actual and disputed. However, the FCC already has determined that USF mark-ups such as those imposed by BellSouth on its customers are unreasonable. *FCC Order of December 13, 2002*, ¶ 49. Moreover, the FCC also determined that carrier invoices that imply that USF charges are mandated by the government constitute a misrepresentation:

> A full, accurate and non-misleading description of the charge would be consistent with our guideline. In contrast, we would not consider a description of that charge as being "mandated" by the Commission or the federal government to be accurate. Instead, it is the carriers' business decision whether, how, and how much of such costs they choose to recover directly from consumers through separately identifiable charges. Accordingly, to state or imply that the carrier has no choice regarding whether or not such a charge must be included on the bill or the amount of the charge would be misleading.

Truth-in-Billing Order at ¶ 57; *see* Universal Service Order, 12 FCC Rcd 8776, 9211-12 ¶ 855 (1997) (noting that carriers "must be careful to convey information in a manner that does not mislead by omitting important information that indicates that the contributor has chosen to pass through the contribution or part of the contribution to its customers and that accurately describes the nature of the charge").

The FCC recently reaffirmed this view: "We conclude it is unreasonable to describe an amount as a universal service regulatory fee when that amount varies from the contribution factor mandated by the regulator." *FCC Order of December 13, 2002, at ¶ 54.* The FCC also stated that the filed-rate doctrine does not apply to a carrier's public disclosure requirements because those requirements are not part of the filed rate. *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace,* FCC 99-47, 14 FCC Rec. 6004, March 31, 1999, ¶ 17.

The filed rate is the amount to be charged, not the ancillary disclosures necessary to prevent deception of consumers. BellSouth has conceded that its tariff does not address the billing and marketing practices at the heart of Petitioner's UDAP claim. 377 F.2d at 435. Bryan does not seek to repudiate the FCC's rate-making authority; to the contrary, Bryan seeks to uphold the FCC's determinations through enforcement of state laws protecting consumers. Because BellSouth's tariff does not encompass consumer disclosures, as the FCC determined and as BellSouth has admitted, there is no actual and disputed federal question *necessarily* to be addressed in deciding Bryan's claim.

Finally, the exercise of federal jurisdiction in this case will unnecessarily intrude upon the state court's right and ability to protect consumers from deception. Certainly it cannot be said that Congress intended for these types of claims to be pursued in federal court. The FCA contains a savings clause preserving all state law claims. 47 U.S.C. § 414. Thus, Congress clearly did not intend for the FCA to completely preempt all state law

causes of action. *Smith v. GTE Corp.*, 236 F.3d 1292, 1312-13 (11th Cir. 2001). The majority of courts that have addressed preemption in the wire-line context have held that Congress did not intend the FCA to completely preempt state law claims so as to make them removable. *E.g., Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 317 (2nd Cir. 2000) ("In the FCA context, we have ruled that the 'complete preemption' doctrine does not apply with respect to state law billing claims."); *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 633 (6th Cir. 1987) (claims for misrepresentation and deception are not federal in character, even though a filed rate is involved); *Russell v. Sprint Corp.*, 2003 U.S. Dist. LEXIS 8852 n. 1 (D. Kan. May 22, 2003) (collecting cases).

Subsequent to *Grable & Sons*, the Court decided *Empire HealthChoice Assur., Inc. v. McVeigh*, __ U.S. __, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006). In that case, the plaintiff argued that because its contract was secured solely as a result of a federal statute, its claims for subrogation necessarily involved a substantial and disputed question of federal law. The Court carefully analyzed the federal subject-matter jurisdiction issue:

> True, distinctly federal interests are involved. Principally, reimbursements are credited to a federal fund, and the OPM-BCBSA master contract could be described as "federal in nature" because it is negotiated by a federal agency and concerns federal employees. But, as in *Jackson Transit*, countervailing considerations control. Among them, the reimbursement right in question, predicated

> on a FEHBA-authorized contract, is not a prescription of federal law.

__ U.S. at __, 126 S. Ct. at 2134, 165 L. Ed. 2d at 147. The Court held that *Grable & Sons* was not so expansive and that the subrogation claims were traditionally brought and adjudicated in state court.

Similarly, BellSouth argues that the deception claim necessarily tramples upon the tariff. Although the tariff is a federal interest and BellSouth remits some of the universal service charge it collects from customers, the FCC has determined that the disclosures accompanying BellSouth's billing and its description of the charge as a federal fee are *not* federal interests. Deception claims like that contained in Bryan's first amended complaint are traditionally adjudicated in state court, and although those claims arise out of misrepresentations concerning a federal tariff, they do not require the resolution of any substantial and disputed federal question. To find federal subject-matter jurisdiction in this case would expand federal question jurisdiction far beyond the Court's recent pronouncements in *Grable & Sons* and *Empire HealthChoice*.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *PARSONS STEEL* AND VIOLATES THE PRINCIPLES OF COMITY ESSENTIAL TO THE FEDERAL SYSTEM.

The District Court stated that if its decision had turned on BellSouth's *res judicata* argument, it would have been inclined to deny the injunction out of respect for principles of comity. Pet. App. at 45a. The District

Court instead rested its opinion on BellSouth's alternate argument that the Court of Appeals' vacatur of the remand order rendered that order a nullity, and retroactively divested the state court of jurisdiction. Pet. App. at 45a. It is notable that, after the case was remanded to state court, the parties conducted substantial discovery and proceedings. BellSouth requested that the case be dismissed under the primary jurisdiction doctrine and referred to the FCC, which motion was denied by the state court. Moreover, the state court certified a class of BellSouth consumers. Despite the extensive activity undertaken in the state court after the remand, the District Court concluded that the injunctive relief "minimally offends notions of comity and federalism," based on its conclusion that the vacated remand order resulted in retroactive nullification of the jurisdiction that the state court unquestionably acquired when the case was remanded. *Id.*

On appeal, by contrast, the Fourth Circuit refused to endorse the "nullification" argument relied upon by the District Court and BellSouth, finding it problematic, and instead based its decision on the *res judicata* argument rejected by the District Court. In so doing, the Fourth Circuit failed to give due regard to the state court's prior determination of this issue.

The Fourth Circuit acknowledged the potential conflict between the exercise of injunctive power under the relitigation exception to the Anti-Injunction Act and the federal court's obligations under the Full Faith and Credit Act. Pet. App. at 16a. Nonetheless, the Court then failed to give proper weight to the state court's determination of the *res judicata* issue. The decision of

the Court of Appeals was directly contrary to this Court's decision in *Parsons Steel, supra,* which recognized that even when the relitigation exception was applicable, "important values of federalism and comity embodied in the Full Faith and Credit Act" dictate that an injunction may not issue once the state court has ruled on the merits of the *res judicata* issue and decided it against the party seeking the injunction:

> We believe that the Anti-Injunction Act and the Full Faith and Credit Act can be construed consistently, simply by limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue.

474 U.S. at 523-24, 106 S. Ct. at 771-72, 88 L. Ed. 2d at 883-84.

Furthermore, in *Parsons Steel* this Court made clear that under the circumstances of this case, the District Court was not the proper forum within which to challenge the correctness of the trial court's decision on the *res judicata* issue:

> Even if the state court mistakenly rejected respondents' claim of res judicata, this does not justify the highly intrusive remedy of a federal-court injunction against the enforcement of the state court judgment. Rather, the Full Faith and Credit Act requires that federal courts give the state-court judgment, and particular the state court's resolution of the res judicata issue, the same

> preclusive effect it would have had in another court of the same state. *Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court.*

474 U.S. at 525, 106 S. Ct. at 772-73, 88 L. Ed. 2d at 884-85 (emphasis added).

As did the respondents in *Parsons Steel*, BellSouth "chose to fight out the *res judicata* issue in state court first, and only after losing there did they return to federal court for another try." 474 U.S. at 524, 106 S. Ct. at 772, 88 L. Ed. 2d at 884. Under *Parsons Steel*, BellSouth is required to pursue its challenge to the correctness of the trial court's determination as to the conclusive effect of the federal judgment within the state-court system, and then by way of a petition for review with the U.S. Supreme Court.

Parsons Steel made clear that the relitigation exception to the Anti-Injunction Statute does not permit a federal court to ignore a prior state court order that decided the very *res judicata* issue upon which the relitigation exception itself is based. Thus, a district court may not enjoin the pursuit of a state claim under the relitigation exception if to do so would fail to give full faith and credit to a prior state court determination on the *res judicata* issue. Yet that is precisely the effect of the decisions by the District Court and the Court of Appeals in this case.

BellSouth, by raising the *res judicata* issue in state court in the first instance by its motion to dismiss, did not have the option of seeking an injunction in the District Court, and the Court of Appeals erred when it upheld the District Court's grant of the injunction.

In order to invoke the "relitigation exception" to the Anti-Injunction Statute's bar, the Court of Appeals disregarded the state court's prior ruling on the *res judicata* issue, in violation of the Full Faith and Credit Act. Under *Parsons Steel*, this it cannot do. The decision of the Court of Appeals upheld a significant intrusion upon the state court's rights and violated the principle of comity that underlies our federal system. Even the District Court recognized the principle, set forth in *Parsons Steel*, that entry of an injunction based on BellSouth's *res judicata* argument would be an improper intrusion into the right of the state court to decide this issue:

> Had this matter turned on the issue of preclusion, the court would have been inclined, in an effort to avoid interfering with the "legitimate activities" of the state, to deny BellSouth's request for injunctive relief.

Pet. App. at 45a.

In summary, BellSouth's resort to the District Court was an improper attempt to challenge the state court's decision on the *res judicata* issue, an issue that BellSouth brought before the state court in the first place by its motion to dismiss. Having elected to raise this issue in state court first, BellSouth invoked the jurisdiction of

the North Carolina courts to decide this issue, and was obligated to pursue any challenge to the state court's decision by way of appeal through the state-court system. By its decision, the Fourth Circuit improperly divested the state court of its right to resolve the issues presented by BellSouth's motion to dismiss, contrary to this Court's decision in *Parsons Steel.*

CONCLUSION

Applying the principles set forth most recently by this Court in *Grable & Sons* and *Empire HealthChoice*, it is apparent that the federal courts lacked subject-matter jurisdiction, and the injunction of the District Court at the heart of this dispute is null and void.

Assuming, *arguendo*, the existence of federal subject matter jurisdiction, the decision of the Court of Appeals conflicts with the decision of this Court in *Parsons Steel* and unnecessarily intrudes into the legitimate activities of the state, thus undermining principles of comity which undergird our federal system. The Fourth Circuit's decision raises issues of signal importance to the jurisdiction of the state and federal courts, and therefore should be reviewed by this Court.

For the foregoing reasons, Petitioner prays that this Court grant her petition for a writ of certiorari.

Respectfully submitted,

AMIEL J. ROSSABI
Counsel of Record
FORMAN ROSSABI BLACK, P.A.
3623 North Elm Street
Suite 200
Greensboro, NC 27455
(336) 378-1899

MICHAEL G. WIMER
WIMER & JOBE
349 Haywood Road
Asheville, NC 28806
(828) 350-9799

Counsel for Petitioner

October 1, 2007